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No. 03-1693

In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS, as Pulaski County Judge Executive

Petitioners,

v.

ACLU OF KENTUCKY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming a supplemental preliminary injunction prohibiting Ten Commandments displays in two Kentucky counties where – after first posting stand-alone Ten Commandments displays, then altering those displays during litigation to include excerpts of text focusing on religion – the counties posted a third display surrounding the Ten Commandments with patriotic and political documents from American, Colonial and British history?

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STATEMENT OF THE CASE

In 1999, McCreary County erected in its county courthouse a Ten Commandments display consisting only of a "framed copy of one version of the Ten Commandments . . . [which] was not part of any larger educational, historical, or retrospective exhibit." [Petitioner Appendix (Pet. App.) 6a.] It did so pursuant to a fiscal court (county legislature) order, signed by petitioner Jimmie Green, *id.*, that "the display be posted in a very high traffic area of the courthouse." *ACLU of Kentucky v. McCreary County,* 96 F.Supp.2d 679, 684 (E.D. Ky. 2000) (*McCreary County I*).

Pulaski County erected a similar display in its county courthouse. [Pet. App. 6a.] Petitioner Darrell BeShears (the County Judge Executive, or chief executive branch officer) candidly expressed his religious purpose in erecting the display: "I've always felt like God comes first, country second and family third." [Joint Appendix on appeal to Sixth Circuit (J.A.) at 86-89.]

The respondents filed suit, contending that the Ten Commandments displays violated the First Amendment's establishment clause. [Pet. App. 3a.] Soon thereafter, the petitioners modified their Ten Commandments displays to include several other documents; the petitioners conceded that they did so "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." [Pet. App. 7a (quoting *McCreary County I*, 96 F.Supp.2d at 684).] Instead of stand-alone copies of the Ten Commandments, the petitioners' modified displays included all or part of eight

documents.[1] [Pet. App. 7a] In their second displays, the petitioners "excerpted a small portion of [some documents] to include only that document's reference to God or the Bible . . . " [Pet. App. 8a (quoting *McCreary County I*, 96 F.Supp.2d at 684, 696)(brackets added).] Upon motion, the district court preliminarily enjoined the continuation of these modified Ten Commandments displays. [Pet. App. 8a.][2]

Several months later, the petitioners erected their third Ten Commandments displays. [Pet. App. 8a.]. This time, instead of surrounding the Ten Commandments with excerpted text focusing on God or the Bible, the petitioners surrounded the Ten Commandments with American (and earlier Colonial and British) political and patriotic texts, song lyrics and a picture. [*See* Pet. App. 8a-10a (detailing contents of displays).] The courthouse displays contained a Biblical reference, identifying the Ten Commandments as deriving from the "King James Version" of "Exodus 20:3-17." [Pet. App. 10a, n.5.] Upon further motion, the district court supplemented its preliminarily injunction to enjoin the petitioners' third version of their Ten Commandments displays. [Pet. App. 12a-13a.]

[1] The eight documents were an excerpt from the Declaration of Independence, the Preamble to the Constitution of Kentucky, the national motto of "In God We Trust," a page from the Congressional Record declaring 1983 the Year of the Bible, a proclamation by President Lincoln declaring April 30, 1863 a National Day of Prayer and Humiliation, an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, a proclamation by President Reagan marking 1983 as the year of the Bible, and the Mayflower Compact. *McCreary County I*, 96 F.Supp.2d at 684.

[2] The governments initially appealed, but then abandoned their appeals, from the preliminary injunctions. [*See* Pet. App. 4a.]

A divided Sixth Circuit panel affirmed, agreeing that – on this record – the district court did not abuse its discretion in finding that the petitioners' primary purpose in posting their Ten Commandments displays was to endorse religion. *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003).[3]

In addressing whether the predominant purpose for petitioners' displays was religious, the Sixth Circuit read *Stone v. Graham*, 449 U.S. 39, 42 (1980), to require that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message." [Pet. App. 21a-22a.] In the courthouse context, "[t]he government achieves this goal by ensuring that the symbols, pictures and/or words in the display share a common secular theme or subject matter." [Pet. App. 22a.] And the Sixth Circuit deemed it necessary to examine three factors "when assessing whether the Ten Commandments have been presented objectively and integrated with a secular message: the content of the displays, the physical setting in which the Ten Commandments are displayed and any changes that Defendants have made to the displays since their inception." [*Id.*]

The Sixth Circuit found that all three factors – content, context and evolution of the displays – showed a predominantly religious purpose. As for content: The displays' one-page prefatory document "asserts a connection between the Ten Commandments and 'the formation of our country' and 'our legal tradition.'" [Pet. App. 27a-28a.] But the Court

[3] One judge concluded (as had the district court) that the displays also had the impermissible effect of endorsing religion; one disagreed; the third declined to reach the issue.

deemed this thesis "not facially apparent" and found that "the preface offers no explanation" to show how "the Declaration [of Independence] is in any way connected with the Ten Commandments." [Pet. App. 18a.] The Court found that the "solitary similarity" between the Ten Commandments and the Declaration of Independence – that both recognize the existence of a deity – "hardly demonstrates how the Ten Commandments *in particular* influenced the writing of the Declaration and, hence, the foundation of our country and legal tradition." [*Id.* (emphasis in original).] The petitioners thus failed to "buttress the historical claim that the prefatory document makes about the Ten Commandments' foundational role in the drafting of the Declaration of Independence," [Pet. App. 29a], and did not cite "to a single historical source in support of the proposition that the Ten Commandments inspired the drafting of the Declaration of Independence." [Pet. App. 32a.] The Court therefore found that the display was not an "objective presentation of the Ten Commandments," [*id.*], but one that went "out of its way to stress the proposition that the Ten Commandments formed the foundation of the Declaration of Independence while utterly ignoring (and implicitly denying) all other influences." [*Id.*]

The Court therefore deemed the content of the petitioners' displays to evidence a religious purpose: "When distilled to their essence, the courthouse displays demonstrate that [petitioners] intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition." [Pet. App. 32a.] Because the display asserted "that the Ten Commandments provide *the* moral background of the Declaration of Independence and

the foundation of our legal tradition" and thus "emphasiz[ed] a single religious influence, with no mention of any other religious or secular influences," the Sixth Circuit concluded that the district court did not abuse its discretion in finding that petitioners' primary "purposes were religious." [Pet. App. 33a (internal quotation marks and citation omitted) (emphasis added in *McCreary County I*).]

As for context: The Sixth Circuit recognized that *Stone* and *Lynch v. Donnelly*, 445 U.S. 668 (1984), governed its inquiry. Applying those cases, the Court concluded that, even though the displays "did not provide undue physical emphasis to the Ten Commandments," the "Commandments are an active symbol of religion . . . As such, [petitioners] had to exercise special care to present the Ten Commandments objectively and as an integral part of a non-religious message," but failed to do so. [Pet. App. 35a-36a.]

As for evolution of the display: The Sixth Circuit recognized that *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), required it to consider petitioners' conduct throughout this dispute in determining their primary purposes. [Pet. App. 36a.] Petitioners' first displays contained only the Ten Commandments. Their second displays "accentuated [the petitioners'] religious purpose . . . by posting the Commandments along with specific references to Christianity and texts that . . . were chosen solely for their religious references." [Pet. App. 41a (internal quotation marks omitted).] Their third displays – at issue here – contained full text from secular political and patriotic documents. [*See* Pet. App. 8a-10a (describing content of displays).] Applying *Santa Fe*, the Sixth Circuit held that the district court did not clearly err in concluding that

the evolution also "indicated that the primary purpose was religious." [Pet. App. 42a.]

The Sixth Circuit later denied rehearing en banc, with two judges concurring and two dissenting. [Pet. App. 163a-176a.]

REASONS FOR DENYING THE WRIT

Review is inappropriate for three reasons. First, the Sixth Circuit correctly applied settled establishment clause law in finding that the district court did not abuse its discretion when it concluded that – on this record, with this litigation history – the petitioners' primary purpose in repeatedly posting the Ten Commandments was to endorse religion. The petitioners merely seek to correct what they perceive to be an incorrect application of well-settled principles of law.

Second, there is no conflict among the circuits. The Sixth Circuit's opinion applies the same governing principles as has every federal court of appeals considering Ten Commandments displays. Where the outcomes differ, they do so because of a case's specific facts or its unique litigation history.

Third, this case's procedural posture warrants denial of review. The district court's opinion was a preliminary injunction, where it deemed respondents likely to prevail. The Sixth Circuit's review thus was deferential, affirming because the district court did not abuse its discretion. These twin qualifiers – discretion to conclude that a party is likely to prevail – make this case unworthy of review.

ARGUMENT

I. The Sixth Circuit Correctly Applied This Court's Cases To Affirm That Petitioners' Primary Purpose Likely Was To Endorse Religion.

The Sixth Circuit properly recognized the establishment clause principles by which petitioners' displays must be gauged [Pet. App. 15a-16a], and correctly affirmed that petitioners' primary purposes were not secular. In doing so, the appeals court properly applied this Court's lone Ten Commandments case and its general establishment clause jurisprudence.

Where "a governmental intention to promote religion is clear," *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987), this Court has not hesitated to hold the challenged conduct unconstitutional. Thus, the Court has invalidated Louisiana's creationism statute, *Aguillard*; struck down a Kentucky law requiring the posting of the Ten Commandments in public schools, *Stone*; struck down Alabama's moment of silence statute, *Wallace v. Jaffree*, 472 U.S. 38 (1985); and held unconstitutional the mandated daily reading of Bible verses and the Lord's Prayer in public schools. *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). Significantly, in each of those cases, this Court held that the challenged conduct was motivated by a religious purpose, and disregarded the government's assertion of a sincere nonreligious purpose.

Nor is the requirement of a secular purpose "satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (Justice O'Connor, concurring). While a government's professed secular purpose for an arguably religious policy is entitled to "some deference," it is "the duty of the courts

to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 75) (brackets supplied in *Santa Fe Indep. Sch. Dist.*).

There are two distinct reasons for affirming the appeals court's conclusion that these displays lack a valid secular purpose. First, this Court has rejected a similar articulated purpose as not secular. Second, this litigation's history reveals that petitioners' articulated secular purpose is a sham.

The petitioners assert that they seek merely to show the Ten Commandments' influence on American law and government. But the appeals court correctly held that – by equating this one religious document with the Magna Carta, Bill of Rights and Declaration of Independence; by claiming that the Ten Commandments "provide the moral background of the Declaration of Independence and the foundation of our legal tradition," [Pet. App. 180a]; by "emphas[izing] a single religious influence, with no mention of any other religious or secular influences" [Pet. App. 34a] – petitioners had displayed a non-secular purpose similar to one this Court rejected more than twenty years ago.

In *Stone*, 449 U.S. 39, this Court summarily struck down a Kentucky statute requiring schools to post copies of the Ten Commandments. Kentucky's statute required that each Ten Commandments display include the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41. This

Court was unpersuaded: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted).

The articulated "secular purpose" here is but a variation on that theme. Because the petitioners' purpose – declaring that the Ten Commandments "provide the moral background of the Declaration of Independence and the foundation of our legal tradition" – is conceptually identical to Ky. Rev. Stat. § 158.178(2)'s purpose – showing the Ten Commandments' adoption as the "fundamental legal code of Western Civilization and the Common Law," – *Stone* establishes that the asserted secular purpose "cannot blind" this Court to the obvious sacred nature of the displays. And where, as here, the displays "utterly fail to integrate the Ten Commandments with a secular subject matter" [Pet. App. 33a], the appeals court correctly found no reason to distinguish petitioners' purpose from Kentucky's purpose in *Stone*.

Second, courts "not only can, but must, include an examination of the circumstances surrounding [the governmental] enactment." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308. Here, those circumstances reveal the innately sectarian backdrop to these displays. In 1999, local governments throughout Kentucky posted the Ten Commandments in courthouses, schools and other public buildings. The local governments invited legal challenges and these two received them amid wide publicity. They initially posted only the Ten Commandments and petitioner Greene candidly admitted his religious reasons for doing so. After being sued, petitioners cloaked their displays in textual excerpts celebrating religion and

announced their purpose of "demonstrat[ing] America's Christian heritage." *McCreary County I*, 96 F.Supp.2d at 674. And after the district court enjoined their second Ten Commandments displays, petitioners posted their third, purporting merely to display "historical documents." The district court was well within its discretion, as the appeals court concluded, in finding it no coincidence that the Ten Commandments was among the "historical documents" that petitioners opted to display. The petitioners "nevertheles[s] as[k the courts] to pretend that [they] do not recognize what every [one else] underst[ood] clearly – that this [display was] about prayer." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 319.[4]

For these reasons, the Sixth Circuit properly applied this Court's precedents in affirming the district court's conclusion: that respondents are likely to prevail on their claim that petitioners lacked a valid secular purpose for posting their displays.

II. There Is No Significant Conflict In The Federal Appeals Courts.

This Court has considered the constitutionality of governmental Ten Commandments displays only once. In *Stone v. Graham*, 449 U.S. 39 (1980), the Court summarily struck down a Kentucky statute requiring each public school to post the Ten Commandments on classroom walls.

[4] Petitioners complain that the appeals court deemed their current secular purpose forever doomed by their earlier religious purpose. [*See* Petition at 25-30.] But the court did no such thing; rather, it (like the district court) took the earlier articulated purpose into account in assessing whether the current – supposedly secular – purpose is a sham. And *Santa Fe* requires courts to do so.

Although each display was to include a disclaimer that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," *id.* at 41, the Court held the statute unconstitutional because:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths. The Commandments do not confine themselves to arguably secular matters . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Id., 449 U.S. at 41-42 (footnote and citations omitted); *see id.*, 449 U.S. at 42 (referring to the Ten Commandments as a "religious text[]").

The courts of appeals have consistently applied *Stone* to strike down many displays of the Ten Commandments at the seat of government. Here, the Sixth Circuit deemed petitioners' articulated "secular purpose" but a variation on the *Stone* theme. In *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003), the Sixth Circuit applied *Stone* to bar the state from erecting a Ten Commandments monument at the central focal point of the state capitol grounds. In *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002), the Seventh Circuit applied *Stone* to bar the state from maintaining a Ten Commandments monument at the Indiana Statehouse. *See*

id., 259 F.3d at 770-71. And in *Books v. City of Elkhart, Ind.*, 235 F.3d 292 (7th Cir.), *cert. denied*, 532 U.S. 1058 (2002), the Seventh Circuit applied *Stone* to enjoin a city's similar Ten Commandments display. *Id.*, 235 F.3d at 302.

The courts of appeals cases since *Stone* do not conflict with the Sixth and Seventh Circuits' application of that decision.[5] Those circuit court cases permitting Ten Commandments displays have involved truly secular purposes – that is, something other than a thinly-veiled effort to proclaim the triumphal influence of the Ten Commandments on American law. *See, e.g., Freethought Society v. Chester Cty.*, 334 F.3d 247, 262 (3d Cir. 2003) (decision not to remove eighty year old plaque had secular purpose of preserving county's history, where county officials had not "celebrate[d] or highlighte[d]" plaque's religious content); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003) (valid secular purpose, in accepting Ten Commandments monument forty years earlier, of recognizing and commending private organization's efforts to reduce juvenile delinquency); *King v. Richmond Cty.*, 331 F.3d 1271 (11th Cir. 2003) (where no evidence of original purpose exists for use of pictograph of Ten Commandments in county seal, articulation of secular purpose of symbolizing rule of law valid).

[5] Seven years before *Stone*, the Tenth Circuit held that the Ten Commandments are not primarily religious in nature. *See Anderson v. Salt Lake City*, 475 F.2d 29, 34 (10th Cir. 1973). That court has since questioned *Anderson*'s continued vitality. *See Summum v. Callaghan*, 130 F.3d 906, 910 n.2 (10th Cir. 1997) ("Since *Anderson* was decided, however, more recent cases, including a Supreme Court case, cast doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature"); *id.*, 130 F.3d at 912 n.8 ("our decision in *Anderson* has been called into question by the Supreme Court in *Stone*") (citations omitted).

This case clearly differs from those cited above. All of the above cases involved decades-old displays; petitioners' displays are new. All of the above cases involved articulated secular purposes other than efforts to link the Ten Commandments with American law and government. And none of the above cases had this case's litigation history of repeated unsuccessful efforts to post the Ten Commandments. These stark differences reveal no conflict in the circuits about application of *Stone* to modern Ten Commandments displays.

III. This Case's Procedural Posture Warrants Denial Of Review.

Even if the Court were inclined to review application of the Establishment Clause to a Ten Commandments display, this case is not the proper vehicle for review. The case involves a preliminary injunction. As such, the district court held only that respondents were likely to prevail on the merits. And the appeals court affirmed under a deferential standard, holding that the district court had not abused its discretion in granting its supplemental preliminary injunction. These twin qualifiers – discretion and likelihood of prevailing on the merits – limit the reach of the decision below and make the case unworthy of this Court's review.

CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the context-based inquiry demanded by this Court. There is no meaningful conflict with decisions of another circuit court. And the case's procedural

posture argues against review. Because there are no grounds for granting plenary review, this Court should deny the petition for a writ of certiorari.

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